IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CIVIL APPEAL NO. 31 OF 2020

(C/F Civil Case No. 30 of 2020 at Resident Magistrate's Court of Arusha at Arusha)

EQUITY FOR TANZANIA (EFTA).....APPELLANT

VERSUS

ENOCK NOBERT MALIHELA ..... RESPONDENT

JUDGMENT

08/02/2022 & 25/04/2022

GWAE, J'

This court is called upon to determine as to whether, the Resident Magistrate's Court of Arusha at Arusha (Trial court) was legally justified to strike out the appellant's suit basing its decision on the arbitration clause in the parties' agreement without ascertaining if the respondent was ready and willing to go for the arbitration.

Initially, the appellant, Equity for Tanzania ("EFTA"), filed a suit against the respondent, Enock Nobert Malihela praying for payment of specific damages at the tune of Tshs. 36,699,000/=, payment of loss of payment to Tshs. 16,976,553.9 being outstanding repayment, an order

for return of the equipment, General damages, interests, costs and other reliefs as may be deemed fit to grant by the court.

Upon service of the appellant's copy of the suit, the respondent filed in the trial court a notice of preliminary objection on two (2) points of law, namely;

1. That, the trial court has no jurisdiction to entertain and determine the suit
2. The plaintiff's lacks board resolution to open the suit

After oral submission by the parties' counsel in respect of the 1st limb of objection only, the trial court finally concluded that, where the parties have chosen the sanctity of the arbitration if need arises, the parties should resort to arbitration instead of rushing to the court and that filing of the written statement of defence does not constitute willingness to adjudication rather than arbitration. The trial court consequently strike out the appellant' civil suit with a view of allowing the parties to refer their matter to the arbitration in accordance with clause 14 of their financial lease agreement.

The ruling of the trial court delivered on the 22nd September 2020 aggrieved the appellant who opted to the filing of this appeal on the following grounds of appeal;

1. The trial court erred in law and fact in striking out civil case No. 30 of 2020 on a matter that it had jurisdiction
2. The trial court erred in in law and fact in allowing an agreement entered between the parties to oust its jurisdiction legally established to it by the law
3. The trial court erred in law and fact for failing to appreciate that the respondent had failed to apply for stay of proceedings instead of taking necessary steps of filing written statement of defence on a matter that had an arbitration clause
4. The trial court erred in law and fact in striking out civil case No. 30 of 2020 without first examining whether the respondent was able and willing to go for arbitration
5. The trial court erred in law and fact in striking out Civil Case No. 30 of 2020 without considering the legally established principles to observe where there is an arbitration clause in a contract

When this appeal was called on for hearing, as was the case before the trial court, the appellant and respondent were represented by Miss Patricia Eric and Mr. Adrian Ndunguru, both the learned counsel. The

parties' counsel however sought and obtained leave to dispose of this appeal by way written submission'

In arguing for the appeal, the appellant's counsel combined ground 1 and 2 as well as ground 3, 4 and 5

Supporting the appellant's ground of appeal No.1 and 2 above, the counsel submitted that, the trial court being a creature of the statute its jurisdiction cannot be ousted by the parties to a contract though it is trite law that the parties are bound by their agreement which they freely entered into. He cited the case of **East African Breweries Ltd vs. GMM Company Ltd** (2002) TLR 12 with approval of the case of **Theodore Trading Wendth vs. Chhaganlal Jiwan and Haridas Munji Trading in Partneship under the style of Chahagania Jiwan and Company** 1 T.L.R. (R) 460 where it was held that the parties were not competent in law to agree to oust the jurisdiction of Tanzanian Courts.

In determining the **1st and 2nd ground** of the appellant's appeal, I must first reproduce the said arbitration clause as appearing at clause 14 'B', General Conditions of the parties' financial lease agreement appended in the appellant's plaint it reads;

> "In relation to any dispute arising from or in connection with this agreement the aggrieved party may elect to settle

> the dispute amicably. By signing this lease agreement, the lessee waives to pursue legal action in the courts of the United Republic of Tanzania including but not limited to, any injunctions against the repossession in the case of EFTA declaring the customers in default under this agreement. All disputes arising out of or in connection with the present contract shall be referred to and finally settled by arbitration in accordance with the rules of the Arbitration Act, Cap 15 of the Laws of Tanzania by one or more arbitrators appointed by the parties in accordance with the said Act. Any Arbitration will take place in Dar es salaam and the lessee is responsible for any associated costs to pursue action under the Rules of Arbitration allowed under this contract"

According to the plaint, the appellant was really entitled to file the suit in Arusha Resident Magistrate's Court as per section 18 of the Code since the respondent works for gain in Arusha. However as complained by the appellant and rightly held by the trial court, the arbitration clause reproduced herein above bars institution of a dispute between the parties to a court of law by the lessee (respondent). More so, arbitration clause in question denotes that in the event of any dispute arising from or connected from the lease agreement between the parties must be referred to and be finally settled by way of arbitration. Thus, ousting jurisdiction of courts of law. The wording of the lease agreement in question is therefore found to be in violation of the Arbitration Act. How

can an aggrieved party by an arbitration award be barred from instituting a legal action even after arbitration? The answer in my view, is to the negative since courts in the United Republic of Tanzania are creatures of the statutes including our Constitution under Article 107A where judiciary is the only organ of the state which is the final one as far as dispensation of justice is concern. It follows therefore, the ouster clause in the lease agreement is not consistent with our laws, therefore, the decision in **East African Breweries Ltd vs. GMM Company Ltd** (supra) is applicable. Nevertheless, the parties would still prefer their dispute to arbitration as per their financial lease agreement but if one is aggrieved by an award of an arbitrator, he may have another remedy of instituting a case or reviving the proceeding in the court of law if the same was stayed pending arbitration.

Now, as to **the 3rd, 4th and 5th** grounds of appeal herein above, in these grounds, the appellant's counsel was of the view that since the respondent had filed his WSD and since he did not exhibit his readiness and willingness to do necessary actions for conducting arbitration, it was therefore wrong for the trial court to strike out the appellant's suit. He based his argument on section 6 of the Arbitration Act Cap 15, Revised Edition, 2019 and Rule 18 of the Arbitration Rules and a judicial

jurisprudence in **Trade Union Congress of Tanzania (TUCTA) vs, Engineering Systems Consultants Ltd and two other,** Civil Appeal No. 51 of 2016 whose decision was delivered on the 26th May 2020. I am wholly in agreement with the counsel for the appellant that if the respondent was really willing and ready to have the dispute referred to arbitration he would not filed his written statement of defence in the trial court except that, he would make an application for stay of appellant's suit exhibiting existence of arbitration clause to the parties' lease contract and his preparedness and willingness to cover any arbitration costs as required by section 6 of the Arbitration Act (supra) and Rule 18 of the Arbitration Rules. These provisions of the law were stressed by the Court of Appeal when it faced the similar situation in **Trade Union Congress of Tanzania (TUCTA) vs, Engineering Systems Consultants Ltd and two other** (Supra) where it was authoritatively held that and I find it compelling to quote part of the decision as herein under;

> "We agree with both the learned judge and the respondent's counsel in that, after filing of the written statement of defence, the appellant lost the right to refer the matter to an arbitrator because that signified the preparedness to resort to court. The Fact that the appellant denied the existence of the contract worsened

matters because it removed the very basis for going to an arbitrator"

In our instant matter, it is vividly clear that, the respondent filed his written statement of defence in the trial court on the 25th June 2020 which was accompanied by a notice of preliminary objection duly filed on the same date. Thus, act of the respondent of filing written statement of defence to the appellant's suit, connotes that he acquiesced to proceed with adjudication of the legal proceedings instituted by the appellant in the trial court instead of arbitration considering the one who would be responsible for the arbitration costs was the respondent as depicted in the clause 14 of the financial lease agreement.

The trial court is therefore found to have misdirected itself by striking out the appellant's suit without ascertaining if the respondent was ably ready and willing to go to arbitration taking into account that he is the one who is contractually responsible to cover all costs connected with arbitration proceedings.

Accordingly, the trial court did not properly direct its mind by not satisfying itself whether the respondent would meet the requirements for going to arbitration. More so, even if the trial court would be fully satisfied with the financial ability of the respondent to meet the arbitration costs

and related expenses yet, she ought to abide to the law as it then was, by staying the proceedings (See section 6 of the Act) and not striking out the appellant's suit.

Though the Vision of our judiciary is timely justice including ensuring that, all cases are expeditiously heard and determined however in our matter the only order which was legally available was to stay proceedings and issue an order directing the parties to go for arbitration since by striking out the appellant's suit will inevitably lead to unnecessary costs for filing of subsequent parties' pleadings in the event either of the parties is not satisfied with the award.

Basing on the above discussions herein, this appeal is meritorious, it is hereby allowed. The matter shall be remitted to the trial court for it to be heard and determined expeditiously. Following the nature of the dispute between the parties, I refrain from giving orders as to costs.

It is so ordered.

Dated at Arusha this 25th April day of April, 2022.

M. R. GWAE
JUDGE
25/04/2022